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**IN THE
Supreme Court of the United States
TERM, 1968**

No. [REDACTED] 35

CARL F. GRUNENTHAL,

Petitioner

v.

THE LONG ISLAND RAILROAD COMPANY,

Respondent

and

T. F. CONTRACTING CO. INC.

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR
THE SECOND CIRCUIT**

Docket No. 31491

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No.

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**PETITION FOR A WRIT OF CERTIORARI
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Docket No. 31491

Petitioner, Carl Grunenthal, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on January 11, 1968.

OPINIONS BELOW

The opinion and Order of the Court of Appeals remanding upon condition and the dissenting opinion thereto are attached hereto. (App. 9, 16). They are not reported as yet. The opinion of the District Court filed April 10, 1967, is attached hereto (App. 19). It is not reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1968 (App. 15). The jurisdiction of this Court is invoked under 28 U. S. G. 1254(1) and 45 U. S. C. 51, 57.

QUESTIONS PRESENTED

1. Whether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness?
2. Whether a Court of Appeals may order a new trial for excessiveness in an action under the Federal Employers' Liability Act?
3. Whether the action of the District Court in refusing a new trial in this case is without support in the record?
4. Whether, assuming the power of the Court of Appeals to act in these circumstances, the alternative given by it to the plaintiff of a new trial generally is a proper exercise of such power?

CONSTITUTIONAL PROVISION

The Seventh Amendment to the Constitution of the United States:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTE INVOLVED

The Federal Employers' Liability Act (45 U.S.C. 51):

"Every common carrier by railroad while engaging in commerce between any of the several States or Terri-

tories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier, in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury, or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

Petitioner, an employee of the respondent, instituted this action against it under the Federal Employers' Liability Act (45 U.S.C. 51) to recover damages for severe and permanent injuries suffered by him during the course of his employment. By Order of the District Judge, the issues of liability and damages were separately tried before the same jury. The jury rendered its first verdict in favor of petitioner on the liability issue and its second verdict assessing damages in the amount of \$305,000.00. The District Court denied respondent's motions for judgment n.o.v. and for a new trial, specifically holding that the verdict was not excessive and should not be disturbed (App. 23).

On appeal, the majority of the panel of the Court of Appeals held that there was no merit in any of the respondent's arguments as to the issue of liability (App. 12), but that the verdict was grossly excessive (App. 14). It remanded the case "to the District Court for a new trial unless plaintiff (petitioner) agrees within thirty days from

the filing of this opinion to remit such part of the recovery as exceeds \$200,000.00."

The issues here raised were not involved in the proceedings before the District Court. They were raised in petitioner's (appellee's) brief in the Court of Appeals.

The basis for federal jurisdiction in the District Court was the Federal Employers' Liability Act (45 U.S.C. 51-56).

ARGUMENT

I

Constitutional Limitation and Conflict With the Decisions of This Court

The decision of the Court of Appeals directing a remittitur or new trial because of excessiveness is not within the constitutional power of that Court and is in conflict with the decisions of this Court.

The *Seventh Amendment to the Constitution* provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law".

This Court has not reexamined the question of the application of this provision to the power of the Courts of Appeals in these circumstances since its decision in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474. Until that case was decided and in that decision this Court clearly enunciated the rule that federal appellate courts may not review the action of a trial court in granting or refusing a new trial for error of fact and stated that this rule is applicable where the issue is the inadequacy or excessiveness of the verdict. (Cf. dissenting opinion in *Dimick v. Schiedt*, 293 U.S. 474, 489). It was specifically on the ground that the *Seventh Amendment* interdicted the Court of Appeals' redetermination of facts that this Court decided *Atlantic & Gulf Stevedores v. Ellerman*, 369 U.S. 355.

The Courts of Appeals have unjustifiably assumed that this Court has receded from this position by language which

it used in *Affolder v. New York, C. & St. L. R. Co.*, 339 U.S. 96, 101. In that decision this Court, quoting from an English authority, merely commented that the verdict below was not "monstrous". The rationale of the Courts of Appeals has been that the *Seventh Amendment* does not interdict review of excessiveness if it constitutes an "abuse of discretion" on the part of the District Judge: *Dagnello v. Long Island R. R. Co.*, 289 F. 2d 797; or that the verdict is so grossly excessive that the refusal to disturb it constitutes an error of law: *Complete Auto Transit v. Floyd*, 251 F. 2d 943; or that the verdict is "monstrous": *Solomon Dehydrating Co. v. Guyton*, 294 F. 2d 439. That this view has not been sanctioned by this Court is apparent in its decision in *Neese v. Southern Railway Company*, 350 U.S. 77. There, this Court reversed the Court of Appeals for the Fourth Circuit without reaching the question of whether the appellate power exists under the *Seventh Amendment*.

The decision of the Court below in directing a new trial unless a remittitur is filed for the single reason that the majority of that Court's panel found the verdict "grossly excessive" violates the *Seventh Amendment* and conflicts with this Court's decision in *Fairmount* and its antecedents.

II

Excessiveness of a Verdict Sustained By the Trial Court In a Federal Employers' Liability Act Case Is Not Reviewable

The decision of the Court of Appeals is in conflict with all recent decisions of this Court in actions under the *Federal Employers' Liability Act* (45 U.S.C. 51). This Court has consistently denied the power of the appellate courts to interfere with jury verdicts sustained by trial courts where issues of fact are involved: *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35; *Bailey v. Central Vermont R. Co.*, 319 U.S. 350; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54; *Lavender v. Kurn*, 327 U.S. 645; *Ellis*

v. Union Pacific R. Co., 329 U.S. 649; *Wilkerson v. McCarthy*, 336 U.S. 53; *Stinson v. Atl. C. L. R. Co.*, 355 U.S. 62; *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500; *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 109; *Harrison v. Missouri Pacific R. Co.*, 372 U.S. 248; *Dennis v. Denver & Rio Grande Western R. Co.*, 375 U.S. 208; *Harris v. Pennsylvania R.R. Co.*, 361 U.S. 15; *Moore v. Terminal R.R. Ass'n of St. Louis*, 358 U.S. 31.

The amount which should properly be awarded as damages is no less an issue of fact and therefore no less a jury question than negligence: *Rogers v. Missouri Pacific R. Co.*, supra; or employment status: *Baker v. Texas and Pacific Ry. Co.*, 359 U.S. 227; or medical causation: *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107; or legal causation: *Gallick v. Baltimore & Ohio R. Co.*, supra; or validity of a release: *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359.

Unless there be found a complete absence of evidence upon which the jury has decided such an action, this Court has consistently reversed every appellate interference with a verdict in a *Federal Employers' Liability Act* case. The District Court here found the jury verdict to be fully supported by the evidence (App. 22) as did the dissenting judge in the Court of Appeals (App. 16). The majority below has substituted its opinion upon this clear question of fact for that of the jury and the trial court.

III

The Verdict Is Supported By the Record and the Opinion Below Is In Conflict With This Court's Most Recent Decision

The most recent decision of this Court which has considered the issue of excessiveness is *Neese v. Southern Railway Company*, supra. There this Court refused to reach and decide the issues above raised, holding that: "Even assuming such appellate power to exist under the Seventh Amendment, we find the Court of Appeals was not

justified, on this record, in regarding the denial of a new trial, upon remittitur of part of the verdict (by the trial court) as an abuse of discretion. For apart from that question, as we view the evidence we think the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The verdict in the instant case is "not without support in the record". The evidence supporting it is extensively reviewed by the District Court (App. 19) and briefly summarized by Hays, C. J., in his dissenting opinion below (App. 16).

The opinion of the majority of the Court of Appeals is in conflict with this Court's decision in *Neese* and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

IV

The Judgment Below Directing a New Trial In the Absence of Remittitur Is Not a Proper Exercise of the Power to Review, If It Exists

Assuming the appellate power to review for excessiveness and further assuming that the amount of the verdict is "without support in the record" within the principle enunciated in *Neese*, the remand of the action for a new trial in the absence of a remittitur is not a proper exercise of this power.

This action was tried in two parts at the suggestion of the District Judge and with the consent of all counsel under *Federal Rule of Civil Procedure 42(b)*. The issue of liability was completely separated from the issue of damages and separate verdicts were rendered upon each. No error has been found by the Court of Appeals in either trial. Certainly, then, if the verdict as sustained by the District Judge is deemed to be excessive, there is no justification for direct-

ing a retrial of the liability issue as well. The imposition of this condition upon the petitioner's acceptance of the remittitur is onerous and completely unwarranted by the record.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, the judgment of the Court of Appeals reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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Of Counsel:

IRVING YOUNGER

MEYER, LASCH, HANKIN & POUL

APPENDIX
OPINIONS OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Before:

LUMBARD, *Chief Judge*,
MEDINA AND HAYS, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*.

The Long Island Rail Road Company appeals from a judgment entered on a jury verdict of \$305,000 in a personal injury action under the Federal Employers' Liability Act, 45 U. S. C., Section 51. Remanded for a new trial unless plaintiff agrees to remit the amount of the recovery in excess of \$200,000.

MILFORD J. MEYER, Philadelphia, Pennsylvania (Meyer, Lasch, Hankin & Poul, Philadelphia, Pennsylvania, and Irving Younger, New York, N. Y., on the brief), *for plaintiff-respondent*.

JAMES T. GALLAGHER, Jamaica, New York (George M. Onken, Jamaica, New York; on the brief), *for defendant and third party plaintiff-appellant*.

THOMAS F. COHALAN, New York, N. Y. (MacIntyre, Burke, Smith & Curry, New York, N. Y., on the brief), *for third-party defendant-respondent*.

MEDINA, Circuit Judge:

In this FELA action a railroad employee, Carl F. Grunenthal, the acting foreman of a group of men engaged in the removal of a partially buried timber tie on railroad premises in the Queens Village Freight Yard of the Long Island Rail Road, has recovered a verdict of \$305,000, the unamended complaint having sought damages in the sum of \$250,000. The Railroad asserted a third-party claim against T. F. Contracting Co., Inc. that had for years furnished a boom truck and its driver for the purpose of moving railroad ties under similar conditions. The issue of liability was tried first and the jury found the negligence of the railroad caused the accident, without any contributory negligence by Grunenthal. The issues as between the railroad and the Contracting Company were reserved for later decision by the trial judge; and the second phase of the trial before the same jury resulted in a verdict for Grunenthal as above stated. Finally, the trial judge dismissed the third-party claim. On the railroad's appeal from plaintiff's judgment entered on the verdict we find no error in the conduct of the trial but remand for a new trial unless plaintiff agrees to remit the recovery in excess of \$200,000, as the verdict is so grossly excessive as to call into play our power to control excessive verdicts. *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961). We affirm the judgment dismissing the third party claim of the Railroad against the Contracting Company. This phase of the case is governed by New York law. *Ratigan v. N. Y. Central R.R.*, 291 F. 2d 548 (2d Cir.) cert. denied 368 U. S. 891 (1961). The undisputed evidence makes it clear that at all relevant times the Railroad had complete control and direction of the driver and operator of the boom truck and of the entire operation of removing the partially buried timber tie. This is enough to settle the issue as between the Railroad and the Contracting Company. *Ramsey v. N. Y. Central R.R.*, 269 N. Y. 219, 199 N. E. 65 (1935); *Irwin v. Klein*, 271 N. Y. 477, 3 N. E. 2d 601 (1936).

Moreover, as held by the trial judge, there is nothing in the record to support a finding of a common law or contractual obligation on the part of the Contracting Company to indemnify the Railroad. Accordingly, we shall make no further reference to this phase of the case.

I

In the Queens Village freight yard of the Long Island Rail Road there was a 20 foot embankment below which was an area with parked cars and people moving about. On top of this embankment and a few feet from the edge of the drop there was buried in the ground a 300 pound, 9 foot 6 inch timber tie with approximately 3 feet of the tie sticking out of the ground. The tie had been there for a long time and it had been used to fasten one end of a chain to protect the edge of the embankment.

On September 19, 1962 Grunenthal, a railroad trackman, as acting foreman had been given instruction by his superiors to remove the timber tie. The group of men under Grunenthal consisted of Michael Chindamo, a helper, and James Finley, the operator of the boom and the truck. Finley and the truck had been used for railroad work, together with railroad employees, on numerous previous occasions, pursuant to an arrangement with the Contracting Company. The three men were accustomed to work together. The customary way to remove an embedded tie was to slack the cable from the boom, fasten a pair of tongs on the projecting part of the tie, take up the slack on the cable until the teeth of the tongs became fastened on to the projecting part of the tie, then raise the tie until it was fully clear of the ground. This was step one of the customary procedure and all the witnesses agree that so far the operation proceeded without any unusual incident. The next step was to lower the cable so the tie could rest flat on the ground and give Grunenthal an opportunity to move the tongs over to the mid-section of the timber tie so that it would balance itself and facilitate the final movement

of lifting the tie and placing it on the truck. Grunenthal testified that, after the timber tie was clear of the ground Finley kept lifting it higher instead of lowering it to the ground. As it went higher in disregard of Grunenthal's signal to stop, the unevenly balanced timber tie started to twist about in an eccentric manner and bumped against the side of the truck. As Grunenthal was endeavoring to control the timber tie as it flailed about, the teeth of the tongs lost their grip and the timber tie fell on Grunenthal's foot. The whole operation was necessarily conducted close to the edge of the embankment and whether Grunenthal's efforts to control the tie and to prevent possible injury to those below the embankment did or did not amount to contributory negligence was clearly a question of fact for the jury. For the same reason we must reject the Railroad's claim of contributory negligence in Grunenthal's failure to give the signal to stop by a movement of his arm at the height of his hip, according to Rule 3405 of the Railroad's Book of Rules. The jury was justified in believing Grunenthal's testimony that taking into account the relative positions of Grunenthal and Finley it was necessary to give the signal chest high to make it visible to Finley.

There was ample proof to sustain the verdict on the subject of liability without taking into account the favored position of plaintiffs in FELA cases. See *Basham v. Pennsylvania R.R.*, 372 U. S. 699 (1963); *Rogers v. Missouri Pacific R.R.*, 352 U. S. 500 (1957); *McCann v. Smith*, 370 F. 2d 323 (2d Cir. 1966).

The Railroad also seeks a reversal, however, on the basis of an incident in a recess period during the trial. This occurred after Grunenthal had given his testimony concerning the falling of the timber tie. Grunenthal, again on the witness stand, said that Finley had come up to him and his wife and told them the accident happened just exactly as Grunenthal had testified. Finley denied he made this statement but admitted he talked with the Grunenthals

"about the time we worked together." Finley did not dispute Grunenthal's statement that he was the one who started the conversation. We find nothing improper in Grunenthal's conduct. The motion for a mistrial was properly denied and we approve all the other rulings by the trial judge relative to this trivial occurrence.

A further contention by the Railroad, more or less connected with the incident just described, is that as Finley was impeached by the testimony of the Grunenthals to the effect that he had made a statement contradictory to his testimony on direct examination, it was error to refuse to admit into evidence a written statement by Finley long prior to the trial to the same effect as his testimony on direct examination. There was no error in ruling out the prior consistent statement. This is a perfect example of the common, garden variety of situation where the general rule excluding prior consistent statements should be applied. Clearly there was no abuse of discretion. Finley's motive at the time he signed the written statement, and at the time he testified on direct examination, and at the time he denied on cross-examination that he told the Grunenthals what they said he told them, was the same, namely to exonerate himself from blame for the accident. If prior consistent statements were received in evidence under these circumstances the basic facts would be buried in the confusion caused by the trial of collateral issues. See *Alexander v. Kramer Bros. Freight Lines, Inc.*, 273 F. 2d 373 (2d Cir. 1959); *Ryan v. United Parcel Service, Inc.*, 205 F. 2d 362 (2d Cir. 1953).

We have examined with care the other points made on behalf of the Railroad and find none worthy of further discussion. Contentions by the Contracting Company are passed over without comment in view of our ruling that the third party claim was properly dismissed.

II

The amount of the verdict is so grossly excessive as to affect the entire case and require a new trial unless Grunenthal agrees within a reasonable time to remit so much of the recovery as exceeds \$200,000. We apply the teaching of *Dagnello v. Long Island R.R.*, 289 F. 2d 797 (2d Cir. 1961) and hold that it would be a denial of justice to permit this verdict to stand.

In his enthusiasm for what he described to the jury after the verdict as their fine "spirit" and "dedication" and "with resounding emphasis in plaintiff's favor all down the line" the trial judge, we think, supplied any "absence of exaggeration" in plaintiff's testimony by doing a little exaggerating himself, as appears in the quotations cited in the dissent.

The complaint demanded a recovery of \$250,000. There was no request for an amendment of the *ad damnum* clause during the trial, no gross amounts or other indications of a possible recovery in excess of \$250,000 were expressed in the summation of Grunenthal's counsel or by the trial judge in his instructions to the jury. While the cases in this Circuit indicate that an award in excess of that prayed for in plaintiff's complaint will not necessarily be set aside on that account, *Riggs, Ferris & Geer v. Lillibridge*, 316 F. 2d 60 (2d Cir. 1963); *Farmer v. Arabian American Oil Co.*, 285 F. 2d 720 (2d Cir.) cert. denied 364 U. S. 824 (1960); *Couto v. United Fruit Co.*, 203 F. 2d 456 (2d Cir. 1953), we think, against the background of the facts of this particular case, the failure to ask for damages in such a large sum as \$305,000 is not without some significance.

Grunenthal was a track worker assigned as acting foreman to the task of directing the removal of the timber tie. He was 45 at the time of the trial, with a life expectancy of 27 years. He had worked as a laborer or trackman for the Railroad during his entire mature life and was receiving, including overtime, from \$5600 to \$6000 a year.

His right foot was crushed by the impact of the heavy timber tie. The compound fracture involved the instep, the great toe joint and the second metatarsal. He was hospitalized on five separate occasions covering a total of 78 days between September 1962 and June 1964. There were several operations, including one of skin grafting and another "right sympathectomy." At one time there was danger that gangrene would develop. During all this period Grunenthal suffered much pain and a dull pain continued up to the time of the trial. While Grunenthal is able to walk his movement is greatly impaired as he is unable to place any weight on the inner portion of his right foot. He is not totally disabled and the testimony of his expert witness indicates he can engage in "sedentary type work." Grunenthal said his efforts for permanent employment up to the time of the trial had been unavailing and he was then engaged in part time work as a custodian.

The instructions to the jury properly allowed a recovery for the loss of past earnings, the loss of future earnings, pain and suffering and inconvenience including "the effect of his injuries upon the normal pursuits and pleasures of life." This was Grunenthal's due. But, giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in *Dagnello*, where the large sum allowed was found not to be excessive, we cannot in any rational manner consistent with the evidence arrive at a sum in excess of \$200,000.

It is futile to attempt a catalogue of instances where under more or less similar circumstances the judges in this Circuit and this Court itself have directed a new trial in personal injury cases unless plaintiff agreed to remit the excess of the recovery over a sum fixed by the judge or by this Court. Each case must stand on its own particular facts.

Affirmed on the dismissal of the third party claim against the Contracting Company. On the appeal of the Railroad from the judgment entered on the verdict of

\$305,000, the case is remanded to the District Court for a new trial unless plaintiff agrees within thirty days from the filing of this opinion to remit such part of the recovery as exceeds \$200,000.

HAYS, *Circuit Judge* (dissenting in part):

I dissent from the decision to grant defendant a new trial unless plaintiff remits \$105,000 of the amount awarded him by the jury.

Plaintiff's evidence as to his injury is uncontradicted. The foreparts of his right foot including the great toe joint and the second metatarsal were crushed and shattered by the 300 pound tie falling from a height of five feet. He was treated in hospitals for more than nine weeks and underwent five serious operations on the foot. He suffered great pain in his foot at all times since the accident and will continue to suffer pain unless the foot is amputated. Because of the inadequacy of the blood supply resulting from the injury, there is constant danger of infection. Plaintiff cannot now bear weight on the foot nor will the condition of the foot improve in this respect in the future. He is severely limited in the kind of work he can do and clearly will never be able to return to his former employment.

The trial judge, who was surely in a better position to weigh the evidence than we are, referred to "the total absence of exaggeration" in plaintiff's testimony describing "the excruciating physical pain and mental anguish" he has endured since the accident. "On the record here," said the trial judge, "it [the jury] had good and sufficient reason to regard and assess [the plaintiff's pain and suffering—past and future] as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery." Of the jury's award the trial court said, "We found nothing untoward, inordinate, unreasonable or outrageous

—nothing indicative of a runaway jury or one that lost its head.”

While I have no doubt that we have the power to order remittitur, we should use that power sparingly indeed. We are not justified in substituting our opinion for the verdict of the jury except in the most extreme case.

“It is well established, however, that when an appellant seeks a new trial because the verdict was excessive, the grounds for setting aside a denial of such a motion are quite narrow. If the ‘action of the trial court * * * [is] not without support in the record * * * its action should not * * * [be] disturbed by the Court of Appeals.’ *Neese v. Southern Ry. Co.* [350 U. S. 77 (1955)]. And this Court has held that a new trial should not be ordered unless there has been ‘an abuse of discretion’ and the verdict ‘is so high that it would be a denial of justice to permit it to stand.’ *Dagnello v. Long Is. R.R. Co.*, supra, 289 F. 2d at 806. *Accord*, *Diapulse Corp. of Ameirca v. Birtcher Corp.*, 362 F. 2d 736 (2d Cir.) cert. dismissed, 385 U. S. 801, 87 S. Ct. 9, 17 L. Ed. 2d 9 (1966); *La France v. New York, N. H. & H. R.R. Co.*, 292 F. 2d 649, 650 (2d Cir. 1961) (verdict will not be modified unless ‘fantastic’); *Wooley v. Great Atl. & Pac. Tea Co.*, 281 F. 2d 78, 80 (3d Cir. 1960) (verdict not to be disturbed unless ‘so grossly excessive as to shock the judicial conscience’ so that it would be a ‘manifest abuse of discretion’ not to order a new trial).” *Caskey v. Village of Wayland*, 375 F. 2d 1004, 1007 (2d Cir. 1967).

Nor is it amiss, in view of the preferred position to which jury verdicts are entitled in cases under the Federal Employers’ Liability Act, to point out that in no previous case arising under that Act has our circuit ordered remittitur on the ground of excessiveness of the verdict. In *Dagnello v. Long Island R.R. Co.*, 289 F. 2d 797 (2d Cir. 1961), on which the majority seeks to rely, the court in fact

refused to order remittitur and in *Hill v. Long Island R.R. Co.*, 257 F. 2d 736 (2d Cir. 1958), remittitur was ordered because of an ambiguity in the jury's verdict and not because the verdict was excessive.

It is to be hoped that the disregard by the majority in this case for the integrity of the jury's verdict will not be taken by the district courts to justify a widespread increase in the use of remittitur.

OPINION OF THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Opinion of IRVING BEN COOPER, D. J.

This cause came on for trial February 21, 1967. By stipulation entered into by all the parties, the issue of liability was first submitted to the jury for determination. By agreement of defendants the claim over was reserved to the Court.

The jury on February 28, 1967 found against the Long Island Rail Road on liability and thereupon announced (by virtue of a similar stipulation) that the railroad was negligent; that proximate cause had been established; and that plaintiff was not contributorily negligent.

The second trial stage (damages) was heard by the same jury which on March 2, 1967 brought in a verdict in plaintiff's favor for \$305,000.

Third parties plaintiff and defendant made separate motions (hereinafter dealt with) to set aside the verdict. Each motion is denied.

Plaintiff moves to amend the *ad damnum* clause from a demand of \$250,000 to \$305,000. Motion granted.

* * *

The third party plaintiff and third party defendant separately move to set aside the verdict contending:

(1) It is contrary to the weight of the evidence. This motion was denied in open court (Tr. p. 444); in any case there is ample evidence to support a finding that Finley negligently failed to obey plaintiff's signal and that this was the proximate cause of the resultant injury to plaintiff.

(2) The court erred in failing to declare a mistrial when plaintiff talked to Finley in the hall outside the

courtroom, and further erred in failing to charge the jury on the impropriety of this conduct. We believe our rulings correct on this matter and adhere to our views as expressed in the transcript at p. 349.

(3) The court erred, in refusing to admit into evidence a prior consistent statement (3d party defendant's exhibit k) to bolster the testimony of the witness Finley. Here too, we are not inclined to alter our earlier ruling. (Tr. pp. 346-48).

(4) Third party defendant contends that the court erred in denying it the right to cross-examine the witness Chindamo as to a signed statement of the witness (defendant's exhibit i for identification). We believe correct our ruling at trial (Tr. p. 224). The interests of both defendants with respect to the contents of the statement were identical. Therefore, third party defendant had no right to cross examine the witness on that score since there was no adverse interest.

The defendants move to set aside the verdict as grossly excessive.

The cases on this subject naturally offer little assistance, for each contains some factor varying in degree or intensity from all the rest. Judge Weinfeld put his finger on it (*Dagnello v. Long Island R.R. Co.*, 193 F. Supp. 552, 554, *aff'd* 289 F.2d 797 (2d Cir. 1961)):

"No useful purpose would be served in collating the various cases, except to emphasize the contrariety of individual views."

We were impressed with the attentiveness of the jury throughout the course of the trial, its outward show of exemplary deportment, the considerable time it devoted to deliberating on both the liability and damage phases of the trial, and so expressed ourselves in open Court before excusing the jury.

Clearly we have no way of knowing the jury's actual evaluation of the various items making up total damages. We can and must indulge, however, in a fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced.

We can appreciate the heavy weight given the total trial record by the jury in plaintiff's favor. Among other impressive phases of the trial were, (a) the candor evinced throughout by plaintiff, the total absence of exaggeration in his testimony especially when describing the excruciating physical pain and mental anguish he endured since the accident (September 19, 1962), his efforts to obtain employment if only to keep his mind off his incessant misery (he had been in the constant employ of the railroad for approximately twenty years and was forty-one at the time of the accident); (b) the unrebutted testimony of plaintiff's medical expert, his explanation of the highly significant entries appearing in the hospital records relating to intensive and extensive medical treatment (including a sympathectomy) undergone by plaintiff, the setting in of gangrene and the measures taken to check its advance, the impending operation to remove part of the foot and the consequent total loss of its use for the only type of work known to plaintiff, coupled with attendant pain of a "fragile" foot in the future—all this testimony was effectively direct and utterly convincing; (c) tantamount to no contest as to each item of damages was the total trial record adduced by plaintiff.

Wages lost for the period between the dates of accident and trial ($5\frac{1}{2}$ years) amounted to approximately \$27,000.

With a life expectancy of approximately 27 years, plaintiff's future wages based on \$6,000 per annum would conservatively amount to \$150,000; discounted this would be about \$100,000. However, convincing testimony not refuted was offered at trial by plaintiff demonstrating the

steady wage increases in recent time for work equivalent to that rendered by plaintiff, and the strong likelihood that similar increases would continue. It might very well follow, therefore, that the wage increases would offset the discount calculation.

Thus the trial record here has many unusual features, the most outstanding one being the non-controversial nature of the defense as to damages. The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted in toto its full significance and drawn such normal and natural inferences therefrom as the law endorses.

We calculate the jury in its wisdom saw fit to allow an amount approaching \$150,000. for plaintiff's pain and suffering—past and future. On the record here, it had good and sufficient reason to regard and assess it as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery. Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved—especially where clearly unearned or cruelly inflicted. Who is to say this jury was not so composed? If the jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head—in its reflected resolution to so respond.

Concededly, at first blush the verdict appears excessive. However, a detailed analysis of the proof covering the items making up total damages in the light of this particular trial record, with resounding emphasis in plaintiff's favor all down the line, points to a jury that was generous—not generous to a fault or outside the bounds of legal appropriateness.

We are told, and properly so, that the jury's discretion in the assessment of damages in a case predicated on subject matter such as we deal with here is wide—not wild. Theirs is the responsibility. A judge must not interfere with the jury's verdict unless he conscientiously believes it excessive.

Dagnello v. Long Island R.R. Co., supra; Dellaripa v. New York, New Haven & Hartford R. Co., 257 F.2d 733, 735 (2d Cir. 1958). Applying that criterion, we cannot in all good conscience say so.

Each motion addressed to the alleged excessiveness of the verdict is denied.

The jury's verdict remains undisturbed. There being no just reason for delay, let judgment be entered.

This shall be considered an order; settlement thereof is unnecessary.

SO ORDERED:

New York, N. Y.

April 10, 1967

/s/ IRVING BEN COOPER
UNITED STATES DISTRICT JUDGE